No. 06-480

IN THE

Supreme Court of the United States

LEEGIN CREATIVE LEATHER PRODUCTS, INC.,
Petitioner,

v.

PSKS, INC. D/B/A KAY'S KLOSET...KAY'S SHOES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENT

NELSON J. ROACH
D. NEIL SMITH
NIX, PATTERSON & ROACH, L.L.P.
205 Linda Drive
Daingerfield, Texas 75638
(903) 645-7333

STEPHEN R. MCALLISTER
THOMPSON, RAMSDELL & QUALSETH, P.A.
333 W. 9th Street
Lawrence, Kansas 66044
(785) 841-4554

KEN M. PETERSON
ROBERT W. COYKENDALL
Counsel of Record
TIM J. MOORE
LUKE A. SOBBA
WILL B. WOHLFORD
KRISTEN D. WHEELER
MORRIS, LAING, EVANS, BROCK & KENNEDY, CHARTERED
300 N. Mead, Suite 200
Wichita, Kansas 67202
(316) 262-2671

Counsel for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

RULE 29.6 STATEMENT

The corporate disclosure statement included in the Brief in Opposition on Petition for Writ of Certiorari remains accurate.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES Page

LEGISLATIVE HISTORY

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 06-480

LEEGIN CREATIVE LEATHER PRODUCTS, INC.,
Petitioner,

v.

PSKS, INC. D/B/A KAY'S KLOSET...KAY'S SHOES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

1. Notwithstanding that vertical minimum price fixing agreements have been illegal *per se* since 1911, Leegin embarked on a plan to enter written agreements with its key retailers fixing the resale price of Brighton goods. In 1998, Leegin induced those retailers to sign and return a "Brighton Pledge" form in which retailers agreed to abide by Leegin's pricing policy and pledged to "Follow the Brighton Suggested Pricing Policy at all times." (4 R. 972). In the years that followed, Leegin sought, and retailers executed and returned "Brighton Heart Store Agreements" in which retailers agreed to "Sell Brighton products for the suggested price every day, 365 days a year." (4 R. 984). Leegin continued the Heart Store program through the time of trial, requiring "Heart Store" retailers to sign and return a new agreement each year.

Leegin and a number of retail outlets that exclusively featured the Brighton line of products shared common ownership. (5 R. 53) In addition, Leegin licensed a number of other retailers the right to use the Brighton name as a part of their store name. Leegin requires both its commonly owned stores and the independent "Brighton" stores to execute Trademark License agreements. Those agreements bound the licensee to comply with Leegin's pricing and promotional policy. (P. Ex. 114).[1]

Leegin enforced the price fixing agreements against all of its retailers. Jerry Kohl, Leegin's president and owner, testified: "[W]e require every one of our customers, whether they are a Heart Store or a Brighton Collectibles store or a store, as you classify, independent retailers, we require everybody to charge the same price." (5 R. 75-76). Leegin's enforcement efforts took the form of threats to stop shipment, suspensions of shipment pending agreement to raise prices, or, as in Kay's Kloset's case, complete cessation of shipments. (5 R. 83, 6 R. 45-46, 50, 54-56).

At trial, Kay's Kloset proved that this series of contracts—and not some "policy"—constituted illegal price fixing that violated the clear and consistent holdings of this Court that such contracts are illegal *per se*. In this case there is no dispute that Leegin made a conscious and determined choice to enter price fixing contracts with retailers across the nation, and to enforce those agreements.

2. Not only does Leegin manufacture and sell its merchandise to independent retailers, it owns and operates its largest stores. At the time of the trial, Leegin shared common ownership with Brighton Retail, a company that owned fifty Brighton only retail stores, and with Corazon, a company

[1] In addition, Leegin required retailers that wished to sell Leegin's luggage to execute a separate "Luggage Agreement" that obligated the retailers to offer that luggage "at the suggested retail price." (P.Ex. 39)

that owned twenty-one retail stores in four states. (5 R. 52, 55). Those seventy-plus stores, along with the Heart Stores, accounted for a substantial share of Leegin's total sales. (5 R. 60, 123). Several of Leegin's stores were in the Dallas, Texas area, and at least one of them competed directly with Kay's Kloset. (10 R. 11).

By operating its own retail outlets in the best locations (i.e., those locations that can support a stand-alone store exclusively dedicated to Brighton products), Brighton became its own best customer at the retail level. Under these circumstances, Brighton's price fixing agreements effectively constitute a horizontal retailer cartel. Brighton could set the prices above market, and avoid intrabrand competition by securing price fixing agreements with the largest independently owned stores, and forbidding discounting by all retailers.

Indeed, there was ample evidence that Leegin was directing a collusive, horizontal scheme to fix prices at the retail level. The record below shows that Leegin paid for trips for representatives of its largest retailers to meet in Hawaii. Anne Wolfe, one of those retailers, testified about one of those meetings. She described a discussion in a session led by Leegin about pricing practices among Brighton dealers. Those present at the session reached a consensus about Leegin's pricing practices. That cartel agreement was then approved by Jerry Kohl, who owned Leegin and its Brighton Stores. (9 R. 119-24). In an e-mail, Jerry Kohl stated: "What we have decided is OK after talking to more than 100 retailers is a birthday Club that on your birthday (or within a short time of your birthday) a consumer can get a discount on 1 piece of merchandise in your store (everything not only Brighton)." (P. Ex. 73). Leegin implemented the agreement in its own stores, and enforced it against all other stores.

Other evidence showed Leegin acting as a hub in a classic spoke-and-hub horizontal price fixing conspiracy, by serving as a middle man to make agreements between competing stores that wanted to engage in price competition. Leegin's sales representative disclosed how Leegin management would "try and work up some agreement from the middle man. I mean, maybe this will blow up and * * * they'll discuss it with [one retailer]. They'll discuss it with the [the other retailer], you know, make everybody play by the rules." (7 R. 95).

Leegin undertook to suppress competition among retailers in other ways. Jerry Kohl referred repeatedly to this theme in e-mails. For example, he noted that if gift-with-purchase giveaways were permitted, "the other retailers in the area feel they have to compete and before long its [sic] chaos." (P. Ex. 74). Laura Young, Leegin's second-in-command and the person in charge of the Brighton line, declared that discounting activities would "spread like cancer," (P. Ex. 67) and that retailer competition would result in a situation that would be "out of control." (P. Ex. 74).

As a retailer, Leegin had every incentive to undermine competition in the pricing of Brighton products. The manager of Leegin's retail stores testified that fixed minimum prices improved Leegin's profitability and helped Leegin's retail stores "be profitable for a long period of time." (9 R. 64-65).

3. Kay's Kloset is a women's specialty store that operated in the Dallas suburb of Lewisville, Texas.[2] Since it opened in 1986, it has been engaged in the retail sale of women's fashions, shoes, and accessories. In 1995, Kay's Kloset began offering the Brighton line of products. (7 R. 60). At its own expense, Kay's Kloset advertised and promoted the Brighton brand, spending tens of thousands of dollars on television, newspaper and direct mail ads. (7 R. 61-62). As a result, Kay's Kloset became <u>the</u> place to purchase Brighton in its market area. (7 R. 63).

---

[2] Since trial, it has moved approximately two miles to a smaller store in the neighboring town of Flower Mound.

In December 2002, Leegin ceased supplying Brighton products to Kay's Kloset, solely because Kay's was selling Brighton products at prices as much as 20% below Leegin's fixed retail price. The <u>only</u> reason Leegin ever gave for the termination was that Kay's Kloset was selling Brighton below Leegin's fixed price. (6 R. 50). As a result of Leegin's actions, Kay's Kloset lost substantial profits it would have earned selling Brighton products. Because it no longer could offer those products, Kay's Kloset lost all benefit of its large investment in promoting the Brighton brand.

SUMMARY OF ARGUMENT

Vertical minimum price fixing, or resale price maintenance ("RPM"), has been *per se* illegal since the Court's decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). The doctrine of *stare decisis* counsels against overruling century-old, repeatedly reaffirmed precedent absent "special justification," which simply does not exist in this case. *See Dickerson v. United States,* 530 U.S. 428, 443 (2000).

Congress repeatedly has reaffirmed its support of the *per se* rule as furthering the primary antitrust policy objective of lowering prices for consumers. In passing the Consumer Goods Pricing Act of 1975, Congress repealed the Miller-Tydings and McGuire Acts, removing exemptions that permitted states to enact legislation allowing RPM agreements. Both Congress and President Ford made clear that the 1975 Act endorsed the *Dr. Miles* rule and continued to make RPM agreements illegal.

The Court previously has acknowledged that these actions signaled Congressional support for the *per se* rule. *See Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 52 n.18 (1977). Since passing the 1975 Act, Congress has shown its continued support for the rule, repeatedly acting to restrict activities of the Department of Justice aimed at overturning the *per se* rule. Given Congress's strong and clear support for the *per se* rule, the Court should defer to Congress as the body ultimately responsible for determining antitrust policy.

Both the retail segment of the economy and consumers have relied upon the *Dr. Miles* rule. The structure and nature of the American economy is shaped by consumers' desire for lower prices, and retailers' willingness to achieve economies and pass savings on to consumers. Overturning *Dr. Miles* would unsettle the way products are now distributed and priced in this country.

Leegin's arguments for overturning the *per se* rule against vertical minimum price maintenance agreements are based entirely and only upon theories, and not upon demonstrable economic evidence. Empirical studies show that RPM increases prices to consumers, but no study has ever shown that consumers benefit in any way from the imposition of resale price floors. In fact, guaranteed profit margins under resale pricing agreements may serve as a disincentive to dealer innovation in resale practices, and may force many consumers to pay for services that they do not want, do not need and may not receive.

The only uniform and demonstrable effect of RPM is higher consumer prices. This Court should apply the same fundamental principle it recently relied upon in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, No. 05-381, slip op. at 6 (U.S. Feb. 20, 2007): "'[D]iscouraging a price cut and * * * depriving consumers of the benefits of lower prices * * * does not constitute sound antitrust policy.'" (quoting, *Brook Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993)).

In addition to manufacturing and distributing its products, Leegin was a dealer of the same products at the retail level. Leegin's participation in the retail market adds the element of collusion to fix prices horizontally with its other retail competitors. For this reason, the present case is distinguishable from *Dr. Miles*. Liability at trial was still appropriately judged based on the *per se* standard as required by the longstanding prohibition against horizontal cartels. The verdict below can be affirmed on this ground as well.

ARGUMENT

I. TRADITIONAL *STARE DECISIS* PRINCIPLES COMPEL RETAINING THE *PER SE* RULE

Stare decisis is "the basic legal principle that commands judicial respect for the court's earlier decisions and the rules of law they embody." *Randall v. Sorrell*, 126 S.Ct. 2479, 2489 (2006); *Harris v. United States*, 536 U. S. 545, 556–557 (2002). The integrity of the judicial process depends on the proper application of *stare decisis* and its ability to "promote[] the evenhanded, predictable, and consistent development of legal principles [and] foster[] reliance on judicial decisions." *Sorrell*, 126 S.Ct. at 2489 (internal quotations omitted). The Court long has recognized that even though there are times when *stare decisis* cannot justify the continuance of an outmoded rule of law, "the doctrine carries such persuasive force that [the Court] has always required a departure from precedent to be supported by some 'special justification.'" *Dickerson*, 530 U.S. at 443 (quotations omitted).

A "special justification" is "especially necessary where, as here, the principle has become settled through iteration and reiteration over a long period of time." *Sorrell*, 126 S.Ct. at 2489 (citations omitted). The Court, as recently as 1997, recognized that agreements to maintain minimum pricing "remain illegal *per se*." *State Oil Co. v. Khan*, 522 U.S. 3, 17 (1997); *see also NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 138 (1998) ("vertical price fixing * * * may fall within the scope of a *per se* rule * * * "). Indeed, despite numerous opportunities to examine the continuing appropriateness of the *per se* rule, the Court has distinguished the application of the *per se* rule against vertical minimum resale price maintenance from application of *per se* rules against other vertical restraints. The rule enunciated in *Dr. Miles* is certainly one that has "become settled through iteration and reiteration over a long period of time."

No "special justification" exists to merit the extraordinary departure from *stare decisis* that the Petitioner requests in this case. *Dr. Miles* has been settled precedent for nearly 100 years, and experience with the *per se* rule has served to establish its correctness. The long-standing application of the *per se* rule against vertical minimum RPM has created "settled legal expectations." To overturn or alter the rule now would create just the "instability and unfairness" that *stare decisis* is designed to avoid. *Sorrell*, 126 S.Ct. at 2489; *United States v. Int'l Business Machs. Corp.*, 517 U.S. 843, 856 (1996).

"Considerations of *stare decisis* are particularly forceful in the area of statutory construction, especially when a unanimous interpretation of a statute has been accepted as settled law for several decades." *IBP, Inc. v. Alvarez*, 126 S. Ct. 514, 523 (2005). The rule of *stare decisis* in statutory cases is "almost categorical," and departure from it is "always extraordinary." *Rasul v. Bush*, 542 U.S. 466, 493, 506 (2004) (Scalia, J., dissenting). *Stare decisis* is at its strongest where Congress has been invited to and free to change the Court's interpretation of a statute through legislation, but has declined to do so. *Hubbard v. United States*, 514 U.S. 695, 711-12 (1995); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977).

The force of *stare decisis* is particularly strong in this case because Congress has actually legislated with respect to RPM. The passage of the Miller-Tydings and McGuire Acts, and their subsequent repeal by the Consumer Goods Pricing Act of 1975, evidence explicit Congressional approval of the Court's interpretation of the Sherman Act in *Dr. Miles*. Congress's clear endorsement of the *per se* rule against RPM has established that rule as "settled law." *Alvarez*, 126 S. Ct. at 523.

Because *Dr. Miles* has been the controlling law for almost a century, the closest precedent to this case is the Court's treatment of the baseball antitrust exemption. In *Federal Baseball Club v. National League*, 295 U.S. 200 (1922), the Court held that baseball was not subject to challenge under the Sherman Act. That holding was subject to application and reconsideration in cases that followed.

In *Toolson v. New York Yankees, Inc.*, the Court declined to overturn *Federal Baseball* and observed that:

> Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that <u>if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation.</u>

346 U.S. 356, 357 (1953) (emphasis added).

The Court further explained that rationale in *United States v. Shubert*, decided a year later, and reiterated that the application of *stare decisis* in the *Toolson* case was proper because "Congress, although it had <u>actively</u> considered the ruling, had not seen fit to reject it by amendatory legislation." 348 U.S. 222, 229 (1955) (emphasis added). The Court added that "[i]f the *Toolson* holding is to be expanded—or contracted—the appropriate remedy lies with Congress." *Id.* at 230.

The Court has acknowledged that its ruling regarding baseball's antitrust exemption may be "unrealistic, inconsistent, or illogical." *Radovich v. National Football League*, 352 U.S. 445, 452 (1957). Nevertheless, the Court deemed the rule "fully entitled to the benefit of *stare decisis*" and upheld the rule even though multiple consecutive cases found the rule to be inapplicable to every business except baseball.[3] *Flood v. Kuhn*, 407 U.S. 258, 282 (1972). The Court has continued to uphold *Toolson* despite its rulings in numerous cases that would call that holding into question, because it has been "loath * * * to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively." *Id.* at 283-84. The remedy for any illogic or inconsistency in those results has been left to Congress because "[u]nder these circumstances, there is merit in consistency even though some might claim that beneath that consistency is a layer of inconsistency." *Id.* at 284.

In fact, three of the primary reasons the Court advanced in *Flood* for applying *stare decisis* were as follows: 1) Congressional awareness of the rule combined with Congressional inaction regarding the rule; 2) the development of the baseball industry in reliance on the rule; and 3) the continued belief that Congress was the appropriate body to overturn existing law, should a change be warranted. 407 U.S. at 283-84.

The same justifications that support adherence to the baseball exemption apply with greater weight in this case.

A. Congress Has By Action And Inaction Endorsed The *Per Se* Rule Against Resale Price Maintenance

Although the legislative intent behind the Sherman Act is somewhat cloudy, the *Dr. Miles* interpretation of the Sherman

---

[3] See, e.g., *Radovich v. National Football League*, 352 U.S. 445 (1957) (holding that professional football is subject to the antitrust laws); *United States v. Int'l Boxing Club of New York*, 348 U.S. 236 (1955) (holding that the sport of boxing is subject to the antitrust laws); *United States v. Shubert*, 348 U.S. 222 (1955) (holding that the theatrical business is subject to antitrust scrutiny).

Act appears consistent with Congress's original intent.[4] Since *Dr. Miles*, Congress has been active in setting antitrust policy for RPM. "Congress has revisited the area of resale price maintenance regularly—almost in clockwork 20-year cycles—with special attention to the empirical effects of the policy on consumers and interstate commerce." H.R. Rep. No. 237, 102nd Cong., 1st Sess., at 4 (1991). Throughout this time, Congress consistently and unambiguously has recognized the *Dr. Miles per se* prohibition of RPM and relied upon that rule.

1. *Congress Established RPM Policy When It Permitted Fair Trade Laws*

During the Depression, and at the behest of retail trade associations, generally comprised of small, inefficient retailers facing competition from more efficient retailers, Congress passed the Miller-Tydings Act. Act of August 17, 1937, ch. 690, 50 Stat. 693, 15 U.S.C.A. § 1; *See also* Lawrence Anthony Sullivan, Handbook of the Law of Antitrust §132, at 378 (West 1977). That Act was passed in response to state "fair trade" laws, which authorized agreements between manufacturers and retailers fixing the price at which the retailer could resell certain products. In adopting this Act, Congress recognized that, in the Act's absence, these agreements would be in violation of the *Dr. Miles* prohibition. The Miller-Tydings Act exempted such agreements from the Sherman Act so long as they met certain criteria and were authorized by state law.

In 1951, the Court held that fair trade agreements could not be enforced against non-signing third parties without violating the *Dr. Miles* rule. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). In response, Congress passed the McGuire Act, permitting states to enact laws

---

[4] See David H. Marks & Jonathan M. Jacobson, *Price Fixing: An Overview*, 30 Antitrust Bulletin, 199, 227-28 (1985), *citing*, 51 Cong. Rec. 4089-90 (1890).

authorizing RPM agreements to be enforced against non-signing third parties. Act of July 14, 1952, ch. 745, 66 Stat. 632, 15 U.S.C.A. § 45(a). These two Congressional acts, permitting limited exceptions to the *Dr. Miles* rule, were wholly unnecessary unless Congress understood and agreed that RPM agreements were illegal *per se*. Notably, in adopting these exemptions, Congress did not purport to alter *Dr. Miles* in any way.

2. *Congress Ultimately Rejected State Fair Trade Laws And Reiterated Its Endorsement Of The* **Per Se** *Rule*

Congress' experimentation with fair trade and legalized RPM proved very costly to consumers. Studies the Department of Justice conducted in the late 1960s indicated that "fair trade" laws cost consumers in the United States at least $2.1 billion and were estimated to have raised prices on fair traded goods between 18 and 27 percent. S. Rep. No. 466, 94th Cong., 1st Sess., at 3 (1975). Consequently, in the mid-1970s President Ford, the Department of Justice, the Federal Trade Commission, the Council on Wage and Price Stability, discount retailers, small business associations, and consumer groups called for repeal of the Miller-Tydings and McGuire Acts. *Id*. Congress responded, passing in 1975 "An act to amend the Sherman Antitrust Act <u>to provide lower prices for consumers</u>," more commonly known as the Consumers Goods Pricing Act of 1975. Pub. L. No. 94-145, 89 Stat. 801 (codified at 15 U.S.C.A. § 1)(emphasis added).

The long title of the Act demonstrated Congress's overriding policy goal: to provide lower prices for consumers. To accomplish this goal, the Act repealed the Miller-Tydings and McGuire Acts, thus again subjecting RPM agreements to the *Dr. Miles*, *per se* rule. Thus, Congress expressly declared its intent to return to the *Dr. Miles* standard. The Senate Judiciary Committee Report stated that "[w]ithout these exemptions the agreements they authorize would violate the antitrust laws." S. Rep No. 466, at 1. The Committee Report labeled fair trade laws "legalized price fixing" and affirmed its intention that "repeal of the fair trade laws generally will prohibit manufacturers from enforcing resale prices * * * ." *Id*. at 2-3. President Ford wrote in his signing statement that the Act would "make it illegal for manufacturers to fix the prices of consumer products sold by retailers." President Gerald R. Ford, Statement on the Consumer Goods Pricing Act of 1975 (Dec. 12, 1975) *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=5432.

More particularly, President Ford emphasized Congress's goal of achieving lower prices for consumers, observing:

> [The fair trade laws] prevent the American people from receiving the benefit of lower prices on cameras, watches, sporting goods, small appliances, auto supplies, and many other brand name products. In today's economy, these restraints on competition no longer make sense.
>
> When this new legislation takes effect 90 days from now, retailers will again be able to set prices on a more competitive basis, thereby enabling consumers in all 50 States to shop for the best products at the lowest possible prices.
>
> * * *
>
> I commend the Congress as well for its bipartisan recognition that price competition is important to American consumers and for its timely consideration of this legislation.

Id.

Shortly after the passage of the Consumer Goods Pricing Act in 1975, the Court recognized that Congress endorsed the *per se* rule. In *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), the Court affirmed the *per se* prohibition on RPM, stating that "Congress recently has expressed its approval of a *per se* analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair trade pricing at the option of the individual States." *Sylvania*, 433 U.S. at 52 n. 18 (citations omitted).

3. *Congress Rejected Efforts By The Department Of Justice To Undermine The* **Dr. Miles** *Rule*

In the early 1980s, the Department of Justice reversed its past course and adopted a position hostile to the *Dr. Miles* rule. The Department first announced its intentions not to enforce the *per se* ban on RPM, and then began to intervene in private antitrust actions on behalf of defendant-manufacturers accused of vertical price fixing. H.R. Rep. No. 237 at 4. When the Department filed an amicus brief on behalf of the defendant in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), Congress reasserted its position with respect to vertical price fixing. Congress passed H.R. 3222, an appropriations measure that cut-off all funds to the Department which would be used "to overturn or alter the *per se* prohibition on resale price maintenance * * *" Pub. L. No. 98-166, 97 Stat. 1071 (1983).

Based on assurances that the Department would not continue its activities in contravention of Congress's support of the *per se* prohibition of vertical price fixing, Congress did not re-enact an appropriations restriction similar to H.R. 3222 for fiscal year 1984. H.R. Rep. No. 237 at 6. When the Department of Justice began circulating a draft of "Vertical Restraints Guidelines," which restated the Department's refusal to enforce the *per se* rule against vertical price fixing, Congress again passed restrictions on appropriations to the Department. Pub. L. No. 99-180, 99 Stat. 1169 (1985). Contrary to the statement in Leegin's brief, the restrictions were also imposed for fiscal years 1987 and 1988 in Public Law 99-500, 100 Stat. 1783-73, § 605 (Oct. 18, 1986) and Public Law 100-202, 101 Stat. 1329-38, § 605 (Dec. 22, 1987).

4. *Congress Continues To Reject Efforts To Undermine The* **Dr. Miles** *Rule*

Congress has continued to be active in the area of vertical RPM in more recent years as well. In 2002, Congress established the bipartisan Antitrust Modernization Commission. Pub. L. No. 107-273, 116 Stat. 1856 (2002). Congress delegated certain duties to the Commission, including those of examining whether the antitrust laws needed to be modernized, soliciting views from concerned parties on the subject, evaluating proposals for changes, and submitting a final report to Congress and the President. *Id*.

The Commission formed the Single-Firm Conduct Working Group to identify issues the Commission should study with respect to single-firm conduct. In its final recommendations, the Working Group determined that the Commission should not study the *per* se rule against RPM. The Working Group's conclusion was based in part on "Congressional support year in, year out for maintenance of the *per se* rule." Transcript of Meeting of Jan. 13, 2005, at 129-30, *available at* http:// www.amc.gov/pdf/meetings/meetings/50113_Meeting_ Transcript_reform.pdf. (emphasis added).

In 1998, the Trademark Anticounterfeiting Act, which would have prohibited the "unauthorized destruction, modification, or alteration of product identification codes," was introduced in Congress. H.R. Rep. 650, 105th Cong., 2nd Sess. at 1, (1998). Proponents of the bill argued it would "safeguard the ability of manufacturers to control the use of their products with which valuable marks are associated * * *" *Id.* at 5.

Recognizing that the bill could have secondary effects on RPM practices, then Representative Charles E. Schumer opposed the bill. He argued that the bill would limit the distribution of branded goods to discount stores or "parallel markets," enable retaliatory action against discounter, and increase consumer prices. Arguing that the true goal of the bill was to allow manufacturers to have greater control over retail pricing of their goods, Representative Schumer stated:

> The ultimate goal of these manufacturers is to control the final retail price of their products. When done explicitly, this practice known as "resale price maintenance," has been plainly illegal under antitrust laws since 1908. The reason resale price maintenance is illegal is because we want retail outlets to compete on price—that competition yields the best deals for consumers * * *"

Id. at 17. The Trademark Anticounterfeiting Act failed to pass in the House, and has not been reintroduced. H.R. Rep. No. 845, 105th Cong., 2nd Session, at 172–73 (1999). Again, Congress took action to prevent even veiled attempts by manufacturers to achieve RPM, and instead preserved the longstanding *per se* prohibition in order to assure lower prices for consumers.

B. The Court, Congress, Industry, And Consumers All Have Relied On The *Dr. Miles* Rule

Where both Congress and the Court have relied on a precedent to draft laws and decide cases, overruling that precedent has a dramatic effect on settled expectations. *See Sorrell*, 126 S.Ct. at 2490. There is no doubt that the Court consistently has followed and applied the *Dr. Miles* rule in a variety of situations since 1911.[5] There is no doubt that

---

[5] *See, e.g.*, *Straus v. Victor Talking Mach. Co.*, 243 U.S. 490 (1917); *Boston Store of Chicago v. American Graphophone Co.*, 246 U.S. 8 (1918); *United States v. A. Schrader's Son, Inc.*, 252 U.S. 85 (1920); *FTC v. Beech Nut Packing Co.*, 257 U.S. 441 (1922); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939); *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436 (1940); *United States v. Masonite Corp.*, 316 U.S. 265 (1942); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *United States v. Frankfort Distilleries*, 324 U.S. 293 (1945); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *White Motor*

Congress endorsed the continued application of the *per se* rule in the Consumer Goods Pricing Act of 1975. The structure of retailing, and its transformation from small retailers to department stores to big-box stores, to category killer speciality stores has evolved in an atmosphere made possible by the *Dr. Miles* prohibition of RPM. Such widespread reliance compels continued adherence to *Dr. Miles*.

Since 1911, *Dr. Miles* has provided a simple, unambiguous, easily followed rule that facilitates competition and reduces consumer prices. *Dr. Miles* is in no way "unworkable" and provides a simple, bright-line limitation on how manufacturers may structure their pricing policies to comport with the antitrust laws and facilitate competition. *See Swift & Co. v. Wickham*, 382 U.S. 111, 124 (1965).

Further, *Dr. Miles*, especially as it has been further explained in *Monsanto Co. v. Spray-Rite Corp.*, 465 U.S. 752 (1964) and *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988), is clear and easily followed by the courts and industry, reducing uncertainty and fostering stability of the law, two major tenets of *stare decisis*. *Swift & Co.*, 382 U.S. at 124; *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 79 (1993) (Scalia, J., concurring). The simplicity of *Dr. Miles* has facilitated the complete transformation of the retail sector from one based primarily on small independent stores to the current retailing market featuring large retailers. The "wise policy" when a rule is neither unworkable nor poorly reasoned is to adhere to the rule, because of the importance that the law be stable and predictable. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

Co. v. United States, 372 U.S. 253 (1963); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97 (1980); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984); *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987); *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988).

Consumers rely on the ability to comparison-shop between retailers for the best bargain on a certain product, an activity *Dr. Miles* facilitates. Overturning the rule would substantially frustrate the average consumer's ability to shop for a better price or to pick a retailer based upon services offered in conjunction with a particular article.

The passage of the Consumer Goods Pricing Act of 1975, and concurrent re-establishment of the *Dr. Miles* rule against minimum price fixing, has been identified as a "crucial turning point in American retailing." David W. Boyd, *From "Mom and Pop" to Wal-Mart: The Impact of the Consumer Goods Pricing Act of 1975 on the Retail Sector in the United States*, 31 J. Econ. Issues 23 (1997) (hereinafter Boyd). Coincident with the passage of the 1975 Act, the country saw a significant drop in the total number of retail establishments, along with a growth in the sales for each retail store. *Id.* The years since 1975 have seen the development of larger discount retailers offering consumers lower prices. *See Id.* The trend toward discounting can be seen clearly in the Top 100 Retailers list annually published by Stores Magazine, the magazine of the National Retail Federation. The July 2006 report listed Wal-Mart as the top retailer, joined in the top ten by Home Depot, Sears, Costco, Target, Lowe's, and Walgreen—all department or "big-box" stores that specialize in offering customers lower-priced quality items in a convenient setting. Top 100 Retailers, http://www.stores.org/ pdf/06%20 JULY%201-100%20Chart.pdf (last visited Feb. 12, 2007).

Consumers have spoken, and have announced their preference for discount shopping. "Despite everything that we might say about how much we value customer service, look at this list. When push comes to shove, people are going to choose lower prices over service." Margaret Webb Pressler, *Big Box Stores Rate Top-10 List: Wal-Mart's No. 1 Rank Shows U.S. Goes for Price*, WashingtonPost.com, July 11, 2003, http://www.washingtonpost.com/wp-dyn/articles/A419

25-2004Jul11.html. Wendy Liebmann, the founder of consulting firm WSL Strategic Retail, notes that "[d]iscount * * * has become the mantra of today's shopper, regardless of income or education." *Id.*

Consumers rely on their ability to shop at big-box retailers which offer, at lower prices, the same products sold elsewhere. Competing retailers also rely upon their ability to advertise identical goods at lower prices to attract customers. RPM always leads to higher prices for consumers, and eliminates the ability of competing retailers to attract customers by reducing prices. Overturning the rule of *Dr. Miles* would take away the ability of the average consumer to comparison shop for goods, and would dramatically upset the average consumer's lifestyle.[6]

C. The Court Has Indicated That Any Change To The *Dr. Miles* Rule Be Made By Congress

On repeated occasions, the Court has indicated that Congress should set antitrust policy regarding RPM if Congress does not agree with the *Dr. Miles* rule. Shortly after the rule was adopted, Justice Brandeis found that the *Dr. Miles* rule had become "settled law" and stated: "If the rule so declared is believed to be harmful in its operation, the remedy may be found, as it has been sought, through application to the Congress * * *." *Boston Store of Chicago v. American Graphophone Co.*, 246 U.S. 8, 28 (1918) (Brandeis, J., concurring). Notwithstanding this clear invitation, Congress did not change the *Dr. Miles* rule.

---

[6] Leegin has suggested that up to ten percent of all retail products might be subject to RPM if legalized. *See* Petitioner's Brief, n. 12. Given that RPM may increase the price of goods by as much as 18-27% (*see* S. Rep. No. 466, Congress 1st Sess. (1975)), the price shock proposed by Leegin's position is nothing short of enormous.

Concurring in *Monsanto*, Justice Brennan observed that:

> [*Dr. Miles*] has stood for 73 years, and Congress has certainly been aware of its existence throughout that time. Yet Congress has never enacted legislation to overrule the interpretation of the Sherman Act adopted in that case. Under these circumstances, I see no reason for us to depart from our longstanding interpretation of the Act.

465 U.S. at 769 (Brennan, J., concurring)

In reaction to the McGuire Act, the Court observed "Whether it is good policy to permit [state laws sanctioning RPM schemes] is a matter for Congress to decide." *Hudson Distrib., Inc., v. Eli Lilly & Co.*, 377 U.S. 386, 395 (1964). There is no reason to depart from the Court's long-standing and consistent conclusions that should change in this area be needed, it must be sought from Congress. Congress is the appropriate policy making body to address *Dr. Miles* and its progeny:

> the orderly way to eliminate error * * *, if any there be, is by legislation and not by court decision. Congressional processes are more accommodative, affording the whole industry hearings and an opportunity to assist in the formation of new legislation. The resulting product is therefore more likely to protect the industry and the public alike.

Radovich, 352 U.S. at 452.

Antitrust policy is an area of special federal power wielded by Congress, "and it certainly is not for [the Courts] to indulge in the business of policy-making in the field of antitrust legislation." *Jefferson County Pharm. Ass'n, Inc. v. Abbott Labs.*, 460 U.S. 150, 170 (1983) (quoting *United States. v. Cooper Corp.*, 312 U.S. 600, 606 (1941)). Indeed, antitrust analysis involves many broad policy determinations that courts are not equipped to address, and that are best reserved for Congress. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344–45 (1977); *United States v. Pabst Brewing Co.*, 384 U.S. 546, 552 (1966).

For the doctrine of *stare decisis* to retain its "fundamental importance to the rule of law," the Court must follow it. *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). Because *stare decisis* is a central tenet of the Court's jurisprudence, a decision to overrule 100 years of precedent cannot be taken lightly. *See Payne v. Tennessee*, 501 U.S. at 842 (Scalia, J., concurring) ("overruling a precedent of this Court is a matter of no small import."). Indeed, "a doctrine of *stare decisis* that is suspended when five Justices find it inconvenient * * * is no doctrine at all, but simply an excuse for adhering to cases we like and abandoning those we do not." *Hohn v. United States*, 524 U.S. 236, 263 (1998) (Scalia, J., dissenting).

II. THERE IS NO DEMONSTRABLE ECONOMIC EVIDENCE THAT OVERTURNING OR ALTERING *DR. MILES* WOULD PROMOTE EFFICIENCY

A. The *Per Se* Rule Promotes The Fundamental Antitrust Policy Of Lowering Prices

A fundamental principle of antitrust law and policy—repeatedly endorsed by Congress and the courts—resolves the case: "Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. * * * We have adhered to this principle regardless of the type of antitrust claim involved." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. at 340. The Court recently reiterated this principle in the context of a predatory bidding claim in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, No. 05-381 slip op. (U.S. Feb. 20, 2007). In *Weyerhaeuser*, the Court again recognized that "discouraging a price cut and * * * depriving consumers of the benefits of lower prices * * * does not constitute sound antitrust policy." slip op. at 6 (quoting, *Brook Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993)).

Price competition is the driving force in a market economy. "Price is the 'central nervous system of the economy.'" *Nat'l Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 692 (1978) (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940)). "Cutting prices in order to increase business often is the very essence of competition." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 594. When it comes to conduct that lowers prices, "mistaken inferences * * * chill the very conduct the antitrust laws are designed to protect." *Id. See also, Weyerhaeuser,* slip op. at 7-8. A legal rule that inhibits price cutting "risks interference with one of the Sherman Act's most basic objectives: the low price levels that one would find in well-functioning competitive markets." *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 231 (1st Cir. 1983) (Breyer, J.).

Thus, RPM acts on the central nervous system of the economy in a direct way that other vertical restrictions simply cannot. As noted in *Sylvania* and as Justice Brennan observed in *White Motor Co. v. United States*, "resale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only among sellers of the affected product, but quite as much between that product and competing brands." 372 U.S. at 260. By its very nature, RPM eliminates price competition among sellers of a single brand, and prevents those sellers from reducing prices to meet price reductions in competing products, or to challenge competing products by lowering prices. The price competition—both intrabrand and interbrand—that is central to the operation of the marketplace is disrupted.

The theoretical possibility that foreclosing price competition will open some other competitive path is a weak, hypothetical, speculative, and unproven basis for undermining the foundation of antitrust law. No empirical study ever has shown that consumers tangibly benefit by the imposition of RPM, and Leegin points to none.

In stark contrast, empirical studies show that RPM increases price to consumers.[7] This effect alone justifies the *Dr. Miles* rule. Any conduct that is designed to, and which has been proven in action to, raise consumer prices is antithetical to the Sherman Act. That fact justifies treating price restrictions different than nonprice restrictions. Although nonprice restrictions may affect resale prices, the effect is not as direct and certain.

Collective experience includes many instances when the elimination of RPM has led to significant savings for consumers. For example, brand name soft white light bulb prices fell more than thirty percent between 1980 and 2002, following the elimination of RPM and other vertical restrictions; experience in the United Kingdom, France and Sweden showed that RPM impeded the growth of low-cost, low margin distributors; the elimination of RPM is associated with a decline in margins by drug stores—margins have dropped from the traditional 40% level to 20%; and ending Levi Strauss's RPM in 1976 resulted in annual gain in consumer surplus exceeding $200 million for men's jeans alone. F.M. Sherer, *Comment on Cooper et al.'s "Vertical Restric-*

---

[7] Overstreet summarized the empirical evidence: "The price surveys indicate that RPM in most cases increased the prices of products sold with RPM, although this was not always the case." Thomas R. Overstreet, Jr. *Resale Price Maintenance: Economic Theories and Empirical Evidence*, Bureau of Economics Staff Report to the Federal Trade Commission, p. 160 (1983). Howard P. Marvel & Stephen McCafferty, *The Political Economy of Resale Price Maintenance*, 94 J. Pol. Econ. 1074, 1078 (1986), concluded: "In summary, the limited price information on the effects of RPM suggests that the practice exerted substantial upward pressure on retail prices."

tions and Policy," Competition Pol'y Int'l, Autumn 2005, at 65, *available at* http://www.esapience.org/render_cms_image.aspx?itemId=611&detailID=151.

B. No Empirical Study Ever Has Shown, Nor Likely Ever Will, That Resale Price Maintenance Enhances Competition

Notwithstanding years of study, no economist has ever proven that consumers of a product sold subject to RPM benefitted from paying higher prices. Instead, economists have hypothesized possible explanations for manufacturers' desire to fix minimum retail prices. The explanations have varied from the inapplicable notion of "free-riding,"[8] to the dubius notion of "quality certification,"[9] to the notion that RPM may encourage retailers to maintain greater inventory levels. What is missing from this speculation is any evidence that consumers benefit tangibly from higher prices.

---

[8] Phillip Areeda & Herbert Hovencamp, 8 Antitrust Law (2d Ed. 2004) ¶ 1611f (hereinafter Areeda's Hovencamp): "Free riding is, of course, impossible in the absence of significant dealer services that can be freely utilized by consumers who then buy elsewhere." In the case of goods such as those at issue, "services" such as nice displays and knowledgeable, friendly staff are simply not subject to free-riding. See Mathewson & Winter, *The Law and Economics of Resale Price Maintenance*, 13 Rev. Ind. Ord. 57 at 68 (1998). "[W]ith regard to the famous Chicago free-rider, presale services explanation, one could claim that such services have been identified in nine of every five markets in which they actually matter." Howard P. Marvel, *Distribution Matters*, XLIX Antitrust Bulletin 953, 960 (2004).

[9] Areeda & Hovencamp, *supra*, note 8, ¶ 1613g: "As a justification for resale price maintenance, the fashion or quality certification arguments seem relatively weak." Quality certification requires that a manufacturer market to a prestigious retailer, and that other dealers trade upon that prestige. Leegin has chosen not to market to identifiable prestigious dealers, but instead to sell to small retailers, such as Kay's Kloset. Under these circumstances, each dealer is trading on its own prestige, and not relying upon someone else's "quality certification."

Unlike vertical nonprice restraints aimed at insuring efficient levels of services, vertical price restraints are at best blunt instruments. Retailers are guaranteed a super-competitive margin, and a manufacturer supposedly hopes that competitive pressures cause retailers to consume that margin engaging in nonprice competition. In this case, Kay's Kloset served its customers with friendly, well-trained staff in attractive surroundings, stocked a full inventory of Brighton products, and actively promoted the Brighton brand. It did not "free ride" on similar services other retailers provided. It provided services and charged less simply because it was more efficient in doing so. Because of Leegin's illegal pricing agreements, Kay's Kloset was not permitted to pass the benefit of its efficiency on to consumers.

C. RPM Has Negative Effects On Competition, Innovation, And Efficiency

Economists recognize that RPM can interfere with competition in a number of ways. These include the ability of such restrictions to facilitate cartelizing a market, *see Continental T.V., Inc. v. GTE Sylvania*, 433 U.S. at 51 n.18, which may well have been Leegin's goal in this case. Leegin's activities in coordinating its pricing practices with its dealers, as well as acting to mediate disputes among competing retailers, show a retail cartel in operation.

The inability to meaningfully distinguish between cartels formed by retailers and restrictions imposed by manufacturers was a problem confronted in *Dr. Miles* and it continues today. In *Dr. Miles*, the Court held that a manufacturer who imposes a vertical price fixing agreement: "can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and achieve the same results, by agreement with each other." 220 U.S. at 408. See also, *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 744 n.7 (Stevens, J., dissenting) (*Dr. Miles*, made RPM *per se* illegal because

RPM plans "are thereby similar to plans pursuant to which the dealers themselves conspire to fix prices.").

Given the close working relationships that may exist between a manufacturer and its retailers, the possibility that the manufacturer's policies reflect the retailers' desire to avoid competition may well be the reason for most RPM programs. "[W]e doubt that dealer power is that rare and are troubled by an apparent history of price-enhancing resale price maintenance for the benefit of dealers. At least some of the claimed justifications for it actually reflect dealer power, and antitrust rules controlling horizontal combinations cannot prevent these distribution restraints that result from dealer power." Areeda & Hovencamp, at ¶ 1604.

The elimination of intrabrand competition often leads to a number of problems. First, increased efficiency available from price flexibility is eliminated. For example, Leegin's national system of price controls prevented prices from reflecting local conditions or temporal changes in demand. *See* Areeda & Hovencamp, at ¶1631a5 (noting that price stability "is hardly a worthy object for antitrust law. Although price instability and confusion may occasionally impose costs on society, price stabilization remains generally pernicious."). A single nationwide price cap, especially when applied to geographically dispersed dealers with no direct competitors, results in many dealers receiving and retaining excess profits with no incentive to provide any further services.

Second, RPM has been associated with the preservation of outmoded means of distribution. The existence of a guaranteed margin provides retailers with little incentive for innovation in their retail practices. Robert L. Steiner, *The Evolution and Applications of Dual-Stage Thinking*, XLIX The Antitrust Bull. 877, 899 (2004) ("The greatest social welfare loss from (voluntary) vertical restraints * * * has arisen from * * * vertical price restraints that have historically retarded the growth of a series of new and more efficient forms of retailing * * *.”).

Third, manufacturers are shielded from competitive pressure that could arise from vigorous competition among the retailers of the manufacturers’ products. If a manufacturer cannot guarantee a retail margin, a manufacturer may have to engage in price competition with other manufacturers to attract retailers for its product. Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing*, 71 Geo. L.J. 1487, 1492 (1983).

Fourth, providing a guarantee on sales of one brand margin to a retailer can induce the retailer to pressure consumers to move from other products that better fit consumers’ needs to the favored brand. Such behavior is not the result of an efficient market. Areeda & Hovencamp, *supra*, at ¶1601n. RPM encourages dealers to engage in a variety of promotional practices that lead to consumer injury. Warren S. Grimes, *Spiff, Polish, and Consumer Demand Quality: Vertical Price Restrictions Revisited*. 80 Cal. L. Rev.815, 837-38 (1992) (hereinafter Grimes).

Fifth, to the extent that RPM leads to a competitive increase in retailer services, some customers will receive unnecessary and unwanted services, making them worse off because they are forced to pay for such services. William S. Comanor, *Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, 98 Harv. L. Rev. 983, 999 (1985). Given the clear preference for discount stores, it is axiomatic that most customers prefer stores offering lower prices over those offering greater services.

There are limits to the extent to which economic theory can supply a rule of law. Thus, antitrust laws:

> cannot precisely replicate the economists’ (sometimes conflicting) views. For, unlike economics, law is an administrative system the effects of which depend upon

> the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients. Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve. Thus, despite the theoretical possibility of finding instances in which horizontal price fixing, or vertical price fixing, are economically justified, the courts have held them unlawful per se, concluding that the administrative virtues of simplicity outweigh the occasional "economic" loss.

Barry Wright, 724 F.2d at 234 (Breyer, J.).

This reality makes adherence to the *per se* rule appropriate here:

> These conclusions suggest the wisdom of the *Dr. Miles* line of cases that culminated in a per se prohibition of vertical price fixing. The complexities of sorting out procompetitive, benign, and anticompetitive dealer brand promotion (and the difficulty in monitoring dealer conduct) weigh against a rule-of-reason approach to vertical price restraints. Courts are ill-equipped to carry out such open-ended balancing tasks involving potentially limitless economic data and conflicting expert testimony. A simple rule proscribing minimum resale price maintenance is more easily understood and enforced.

Grimes, 80 Cal. L. Rev. 815 (1992).

To the extent some economists have hypothesized that RPM may have some theoretical benefits, economic analysis lacks the tools and sophistication to identify those benefits' presence in a particular situation or to assess whether they offset the attendant adverse effects. The failing is even greater in a market characterized by a high degree of product differentiation.

The obvious and inevitable impact of resale price maintenance—recognized by everyone—is that consumers pay more. Under these circumstances, the permissibility of vertical price fixing must be guided in large part by past experience and common sense, fundamentally pragmatic policy factors, precisely the considerations upon which the *per se* rule of *Dr. Miles* relies. Indeed, it is imperative to safeguard practices that result in lower consumer prices, since "cutting prices to increase business often is the very essence of competition." *State Oil Co. v. Khan,* 522 U.S.at 15.

III. LEEGIN'S RETAIL PRICE FIXING VIOLATED PROHIBITIONS AGAINST HORIZONTAL CARTELS

Leegin did not participate in the market solely as an upline distributor. It was a dealer of its products at the retail level as well. This fact distinguishes this case from *Dr. Miles.* In *Dr. Miles,* the manufacturer defendant was not also an active participant in the retail market implementing a horizontal cartel. No one questions the pernicious effect of retail competitors conspiring to fix prices. That conduct is the archetypal example of actions that are presumed illegal without further examination. *Catalono, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 646-47 (1980). Even Leegin concedes that such horizontal agreements among retailers are anticompetitive. *See* Petition, p. 16.

Contracts between competitors are not saved from the *per se* rule of illegality because one of the competitors distributes to the other. In *United States v. McKesson & Robbins*, 351 U.S. 312 (1955), the Court analyzed a dual-distribution system. In that case, a manufacturer who distributed directly to retailers, as well as to wholesalers, entered into agreements with both retailers and other wholesalers to fix the resale price of its goods. Although the agreements with retailers were saved by the Miller-Tydings and McGuire Act exemptions then in effect, the agreements with other wholesalers were illegal *per se*. The Court noted that those acts "expressly continue[d] the prohibitions of the Sherman Act against 'horizontal' price fixing by those in competition with each other at the same functional level." *Id.* at 313 (quoting *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 389 (1951)). Because the defendant in *McKesson* participated in the wholesale market, its contracts with other wholesalers violated the "*per se* rule of illegality [for] resale price maintenance contracts between firms competing on the same functional level." *Id.* at 315.

Leegin cannot have it both ways. It cannot maintain that vertical price fixing arrangements are benign, while horizontal arrangements are not, and yet maintain that it can both fix prices among retailers and participate in a significant economic manner in the retail market. Such an arrangement violates traditional prohibitions against price fixing among competitors.

The power of Leegin "to fix the price of the product that it manufactures, and which the entire group sells and with respect to which all have been and are now actual or potential competitors, is a powerful inducement to abandon competition." *United States v. Masonite Corp.*, 316 U.S. 265, 281 (1942). Price fixing among competitors of a single brand falls within the long-standing prohibition against horizontal cartels. *See United States v. Sealy*, 388 U.S. 350, 356 n.3 (1967). It does not matter whether the prices or pricing practices were discussed and voted on by the entire group: "The fixing of prices by one member of a group pursuant to express delegation, acquiescence, or understanding is just as illegal as the fixing of prices by direct, joint action." *Masonite Corp.*, 316 U.S. at 276. The negative impact on consumers—who pay higher prices—is the same no matter how a cartel is achieved.

Thus, this case implicates the long-standing prohibitions on both vertical price fixing and horizontal cartels. Permitting Leegin to fix retail prices to benefit its own combined wholesale/retail operation violates the Sherman Act's fundamental prohibition against cartels.

The record below contains compelling evidence of a horizontal cartel designed and intended to benefit Leegin's retail operations. As a result, even were Leegin's conduct not prohibited by the *per re* rule against vertical price fixing, the jury was properly instructed that Leegin's conduct was a *per se* violation of the Sherman Act's bedrock prohibition on horizontal cartels. On this basis alone, the verdict below should be affirmed.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below.

Respectfully submitted,

NELSON J. ROACH
D. NEIL SMITH
NIX, PATTERSON & ROACH, L.L.P.
205 Linda Drive
Daingerfield, Texas 75638
(903) 645-7333

STEPHEN R. MCALLISTER
THOMPSON, RAMSDELL & QUALSETH, P.A.
333 W. 9th Street
Lawrence, Kansas 66044
(785) 841-4554

KEN M. PETERSON
ROBERT W. COYKENDALL
Counsel of Record
TIM J. MOORE
LUKE A. SOBBA
WILL B. WOHLFORD
KRISTEN D. WHEELER
MORRIS, LAING, EVANS, BROCK & KENNEDY, CHARTERED
300 N. Mead, Suite 200
Wichita, Kansas 67202
(316) 262-2671

Counsel for Respondent

February 26, 2007